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IN THE

Supreme Court of the United States

October Term, 1950.

No. 600

JAMES HOSIER,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Chicago and North Western Railway Company, under Rule 24 of this Court, submits this brief in opposition to the petition for certiorari.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 282 F. (2d) 639.

STATEMENT.

Petitioner was struck by a train when he was standing or walking too close to a railroad track; and he brought this suit in the United States District Court for the Northern District of Illinois to recover damages for his personal

injuries. On the day before the trial, the trial judge advised the parties that, in accordance with Rule 21 of the Civil Rules of the District Court,[1] the issue of liability would be tried separately. Plaintiff's counsel at that time objected in general terms to this procedure. He made no objection on the ground that the nature of the case was such that the issue of liability could not be tried separately, or that he would necessarily be precluded by this ruling from introducing evidence of injuries relevant to the issue of liability. At no time during the course of the trial on the separate issue of liability did petitioner ever offer any evidence of injuries.

The issue of liability was submitted to a jury, which returned a verdict of no liability. The judgment entered on this verdict was affirmed by the Court of Appeals. Of the several grounds of error urged upon that court, the only one pursued in the petition relates to the procedure followed in trying the issue of liability separately.

QUESTION PRESENTED.

Was petitioner subjected to prejudicial error, calling for correction by this Court, by reason of the action of the Court of Appeals in affirming a judgment entered on a verdict of a jury after a separate trial of the issue of liability, in the course of which trial petitioner made no proffer of evidence of injury or damage as bearing upon the issue of liability?

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1. "Rule 21. *Separation of Issues in Civil Suits.* Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a pre-requisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counter-claim or third-party claim."

REASONS FOR DENYING THE WRIT.

There are no special and important reasons, within the meaning of Rule 19, why this Court should grant the petition. The petition does not show any important question of federal law which has not, but which should be, settled by this Court; any conflict between the Courts of Appeals; or any decision of a federal question in conflict with applicable decisions of this Court. Neither has the Court of Appeals sanctioned any departure by the District Court from the accepted and usual course of judicial proceedings warranting an exercise of this Court's supervisory powers.

The questions formulated by the petition appear to assert these propositions: First, any rule of procedure which contemplates the exercise of discretion by a trial court to try the issue of liability separately in a personal injury suit is unconstitutional on its face as a deprivation of the right of jury trial guaranteed by the Seventh Amendment to the Federal Constitution; and, second, constitutional considerations apart, the separate trial of the issue of liability in this case had the effect of denying to petitioner a fair trial of that issue, in such degree as to call for reversal by this Court in the exercise of its supervisory jurisdiction.

As to the first, the claim is that Rule 42(b) of the Federal Rules of Civil Procedure is unconstitutional on its face, at least in any personal injury case where the issue of liability is tried separately from the issue of damages. This Court, under whose authority Rule 42(b) was promulgated, has never so decided nor even intimated such a result. There is no conflict among the Courts of Appeals; and, indeed, the only other Court of Appeals decision on the point is in accord with the decision below. *Nettles* v. *General Accident Fire & Assurance Corp.*, 234 F. 2d 243 (5th Cir., 1956).

The second contention can only be that, in the circumstances of this particular case, there was an abuse of discretion in the granting of a separate trial, so serious in its prejudicial effects upon petitioner that the supervisory jurisdiction of the appellate courts should be brought to bear. But the record in this case shows that petitioner made only a general objection at the time the District Court announced its intention to separate the issue of liability for trial; that neither then nor later did he press upon the trial court any specific reasons why the nature of the injury and of the damages in this case had any relevance to the issue of the existence or non-existence of liability; and that at no time during the actual course of the trial did he proffer any evidence of injury or damage as relevant to the issue of liability. The trial judge had never indicated that he would under no circumstances receive any evidence of injury if the same could reasonably be shown to have some relationship to the question of liability; and it must be assumed, therefore, that the failure of petitioner to offer any such evidence was due to the complete absence of any such relationship. On these facts, the claim of prejudicial error becomes virtually as insubstantial as the alleged constitutional issue.

ARGUMENT.

In his discussion of Rule 42(b), Professor Moore makes the following comment:

> "A separate trial may, of course, be granted as to a particular issue, even though it does not amount to a 'claim' or a 'defense'. Separate trial may properly be ordered on the issue of the defendant's liability to respond in damages, particularly where plaintiff's proof of damages would involve the testimony of a large number of persons. This procedure has been privately recommended by a number of members of the judiciary as a means of expediting trials and of saving time and expense. We have found no reason why this procedure, which is authorized by Rule 42(b) should not be more extensively employed * * *" 5 Moore's Federal Practice, ¶42.03, p. 1217.

As the Court of Appeals recognizes in its opinion below, Rule 21 of the Civil Rules of the United States District Court for the Northern District of Illinois rests upon the authority of Rule 42(b) and is simply a special formulation of it in personal injury and other civil cases as a part of an effort to attack the problem of calendar congestion. As in the case of Rule 42(b), Rule 21 is not mandatory, but its utilization rests in the sound discretion of the trial judge. To suggest, as the petition appears to do, that a rule of procedure contemplating a discretionary decision by a trial judge to separate the issue of liability for trial from the issue of injury or damages violates the Seventh Amendment without more, amounts to a frivolity. There is no absolute right in a plaintiff in a personal injury case to have all of his evidence—that pertaining to damage as well as to liability—go before the jury at one time. This Court has never said anything that would provide

any foundation for such a position and, indeed, its own promulgation of Rule 42(b) looks squarely in the other direction.

The only issue tendered by the petition of any conceivable substance, therefore, is that of whether the trial court in this case abused its discretion by invoking Rule 21 and the underlying Rule 42(b), under circumstances which resulted in prejudice so harmful to petitioner that the supervisory powers of the appellate courts should be exercised. The Court of Appeals expressly found nothing in the record indicating such prejudice. It noted that petitioner had not pressed upon the trial court at the time of the original determination to separate the issues any reasons why the facts with respect to injury and damage in this instance were relevant in the jury's determination of liability. Although he was under no admonition from the court not to do so, petitioner did not, during the course of the trial, proffer any evidence of injury or damage whatsoever. Petitioner, accordingly, must be taken as saying to this Court that any separation of the issue of liability from that of damage in a personal injury case constitutes reversible error and that this Court should, accordingly, take this case and so hold. Two Courts of Appeals have now held that there is no such error; and the issue is neither so doubtful nor so lacking in authoritative support in the decided cases to warrant its scrutiny by this Court.

This Court has recognized that the Seventh Amendment guarantees the substance of jury trial as it was known at common law, but that it does not extend to the freezing of rules respecting the admissibility of evidence, the trial of issues, or other procedural matters, if for no other reason than that there was no uniformity in these areas at the time the Seventh Amendment was adopted. *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899); and see *Galloway* v. *United States*, 319 U. S. 372 (1942) at pp. 390-92. Nothing

that was done in the trial of this case falls outside either the letter or the spirit of Justice Brandeis' statement in *Ex Parte Peterson*, 253 U. S. 300 (1920) at pp. 309-10:

> "New devices may be used to adapt the ancient institution (jury trial) to present needs and to make it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with."

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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